

9 Official Opinions of the Compliance Board 94 (2014)

- ◆ **MEETING – DETERMINED TO BE A MEETING**
 - ◇ ATTENDANCE BY A QUORUM AT ANOTHER ENTITY’S MEETING, WHEN MEMBERS DISCUSSED PUBLIC BUSINESS
- ◆ **PUBLIC BODY –GENERALLY**
 - ◇ ENTITIES CREATED BY MEMORANDUM OF UNDERSTANDING ADOPTED BY PUBLIC BODY
- ◆ **MINUTES OF OPEN SESSION – SUMMARY OF CLOSED SESSION IN MINUTES OF OPEN SESSION – GENERALLY**
 - ◇ LEVEL OF DETAIL REQUIRED

*Topic headings correspond to those in the Opinions Index (2010 edition) at <http://www.oag.state.md.us/opengov/openmeetings/appf.pdf>

February 27, 2014

Re: Chestertown Town Council
Craig O'Donnell, Kent County News, Complainant

Complainant Craig O'Donnell alleges that the Town Council of the Town of Chestertown violated the Open Meetings Act (the “Act”) on March 22, 2013 during a meeting of the Chestertown Waterfront Task Force, a committee that was jointly appointed by the Town and Washington College and formally created by a resolution of the Town Council. We have already resolved Complainant’s separate complaint that the Task Force itself violated the Act by meeting without giving public notice. *See 9 OMCB Opinions 92 (2014)*. Complainant alleges here that a quorum of the Council attended the Task Force’s March 22 meeting and conducted Town business without first providing public notice of a meeting of the Council. The Town has now made available the Task Force’s redacted minutes of the meeting. Complainant also alleges that the redactions violate the Act.

As we will explain below, we find that the Town Council violated the notice provisions of the Act. The redactions to the minutes are not violations.

Background

The Town Attorney provided us with the Council's minutes of its March 18, 2013 meeting and the Task Force's redacted minutes of the March 22 meeting. Near the end of the Council's March 18 meeting, various Council members announced upcoming events and meetings of other entities. A Council member announced that the Task Force would meet on the 22nd at Washington College and that the Council was invited to attend. The Task Force's chair, who had been appointed by Washington College, had already extended that invitation by letter. In that letter, the Chair invited three of the four Council members to come to the March 22 meeting to provide their thoughts on the group's "process as well as any ideas or suggestions you have to guide us in our work." He also identified the Mayor and the fourth Council member as members of the Task Force. Neither the letter nor the announcement at the Council's meeting invited the public to attend the Task Force meeting. At the time, (as we recounted in our earlier opinion), the members of the Task Force had not been apprised of its status as a public body. The Council did not publish notice of the meeting as a meeting of the Council itself.

The Task Force's redacted minutes of the March 22 meeting are so detailed as to appear to be a transcript of the meeting. They show that the meeting was convened by the chair. He stated the goal of the Task Force to discuss the future use of the waterfront and asked that the discussions be kept confidential because the group would be discussing private properties. The Mayor and the Council member appointed to the Task Force attended; so did the three other Council members. Although the Mayor left midway through the meeting, all four Council members attended throughout. A quorum of the Town Council members was thus present. At various times during the meeting, all four spoke about the needs of the Town and possible uses of property on the waterfront. The minutes have been redacted in a few places, apparently to block references to the possible acquisition of real property and to particular individuals' or entities' use of their properties.

The existence of the Task Force was no secret. In January 2013, the Town Council discussed the formation of the committee in its public meeting, and the Chestertown Spy reported on a Council member's insistence that all Council members be permitted to attend its meetings. In June, the Kent County News, a complainant here, reported on the extensive work done by the Task Force, referred to the Task Force's expectation to hold more meetings, and stated that the Task Force had been "meeting behind closed doors since March 22." Nonetheless, no one complained then, and the Task Force, apparently unaware that it was subject to the Act, continued meeting and working toward producing a final report. The chair has resigned, and it is unclear whether the group still exists. The Town now has a new mayor; the Council has two new members.

Discussion

A. *Whether the Council met on March 22 without giving notice*

Under the Act, a public body that wishes to meet must give reasonable advance notice to the public of the date, time, and place of the session. State Government Article (“SG”) § 10-506. “Meet,” as defined in the Act, means “to convene a quorum of a public body for the consideration or transaction of public business.” SG § 10-502(g). The Act does not apply to a “chance encounter, social gathering, or other occasion that is not intended to circumvent” the Act. SG § 10-503(a)(2). Accordingly, when a quorum of the members of a public body is present at another entity’s event, we look to whether the members were simply observing the conduct of that entity’s business, or, instead, took the occasion to interact on the public body’s business. *See, e.g., 3 OMCB Opinions 310 (2003).*¹ As explained there:

[T]he key point will often be the actions of the public body members when an item related to public business comes up for discussion. On the one hand, if the public body members do not themselves participate in a give-and-take discussion about a matter related to public business, then no “meeting” of the public body will have occurred. On the other hand, if the members do participate actively, then they will have “convened” a meeting subject to the Act at that point.

3 OMCB Opinions at 312.

Here, the minutes of the March 22 meeting show active participation by a quorum of the Council members in a discussion about the uses that might be made of waterfront property in the Town. This discussion was Town business, and we therefore find that the Council “met” at the Task Force meeting. As the Council did so without giving notice of a Council meeting, we conclude that the Council violated the notice provisions of the Act. The announcement at the March 18 Council meeting that Council members were invited to attend did not serve as notice to the public that others could attend.

B. *Whether the redactions in the Task Force minutes violate the Act*

Complainant alleges that the redaction of the minutes violates the Act. Under the Act, the public is entitled to inspect minutes of open meetings, but not the minutes of closed sessions. *See* SG § 10-509(d), (c)(3). The Act authorizes public bodies to close a session to “consider the acquisition of real property for a public purpose and matters directly related thereto,” SG § 10-508(a)(3), if the public body has first voted, in open session, to meet behind closed doors, on the basis of that exception. *See* SG § 10-508(d). After the meeting, the public body must disclose, in the

¹ Available at <http://www.oag.state.md.us/Opinions/Open2003/om03-12.pdf>.

minutes of its next open meeting, certain items of information about the closed session—the time, place, and purpose of the session, the persons present, the topics discussed and actions taken, the recorded vote to meet in that closed session, the statutory authority for closing it, and recorded votes taken during the closed session. SG § 10-509(c). The difficulty with applying those principles here is that the whole meeting was closed—the public was not invited to attend and was thus effectively excluded—and so the Task Force did not invoke SG § 10-508(a)(3), did not conduct the public vote required by SG § 10-508(d), and did not keep a separate, sealed, set of minutes for the parts of the discussion that fell within the exception. As we explained last month in our opinion about the Task Force, all of those violations flowed from the Task Force’s mistaken belief that it was not subject to the Act.

The Town has, however, taken recent steps to make the post-meeting disclosures that the Act required of the Task Force. Here, the very detailed Task Force minutes provide most of the information that the Task Force would have been required to disclose about a properly closed meeting; they include the time, place, and purpose of the session, the persons present, and the topics discussed, and the actions, if any, taken. The minutes omit only the events that did not happen—a recorded vote to close on the basis of specified statutory exceptions to the Act. *See* SG § 10-509(c). As in 8 *OMCB Opinions* 63, 69 (2012), another matter in which a committee mistakenly proceeded as though it was not a public body and redacted from its minutes discussions that would have fallen within an exception, the public body’s noncompliance with the Act, though hardly ideal, does not give Complainant a right to information to which the Act would not have entitled him.

We are not suggesting generally that public bodies may illegally meet secretly, produce minutes a year later when requested to do so, and retroactively assert a section of the Act as statutory authority for redacting them. Had this meeting been only a meeting of the Council, which unquestionably is a public body, and had the very fact of the meetings been kept secret, our conclusion on this issue might have been different. This Task Force, however, was a joint endeavor with a private entity that apparently had no expectation that the meetings would be subject to the Act, and its chair made no secret that it was meeting.² Under these circumstances, we find that the redactions in the minutes do not violate the Act.

² In 2007, we found that a committee that the Town had formed under a memorandum of understanding (“MOU”) with a conservation association was not a public body. 5 *OMCB Opinions* 184 (2007). That opinion does not suggest that the Council had created the committee by resolution, the fact that made this Task Force a public body. *See* 9 *OMCB Opinions* 92. In hindsight, we believe that the Act should not be interpreted to allow a parent public body to sidestep the Act by creating committees through MOUs with private entities.

Conclusion

Whatever the setting, Council members who find themselves in the presence of a quorum should recall the fundamental policy of the State that “citizens be allowed to observe: (i) the performance of public officials and (ii) the deliberations and decisions that the making of public policy involves.” SG § 10-501. The fulfillment of that policy hinges on the public body’s provision of proper notice of its meetings. Here, we find that the Council violated the Act when a quorum of its members discussed public business without giving the notice required by the Act. We also find that, under the circumstances, the minutes of the meeting are adequate.

Open Meetings Compliance Board

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